Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-252

LARRY MEACHUM, ET AL.,
PETITIONERS,

*v.*

ARTHUR FANO, ET AL.,
RESPONDENTS.

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF OF THE PETITIONERS

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## BRIEF OF THE PETITIONERS

### Opinions Below

The opinion of the District Court, *Fano* v. *Meachum*, is reported at 387 F. Supp. 664 (D. Mass., 1975). The opinion of the Court of Appeals for the First Circuit was issued June 27, 1975 and is reported at F.2d . Both opinions are included as an Appendix to this petition.

## Jurisdiction

The petitioners invoke the jurisdiction of this court pursuant to 28 U.S.C. §1254(1).

## Questions Presented

1. Whether a prison inmate who is transferred, within a state, from a medium security institution to a maximum security institution, when there is no imposition of disciplinary punishment at the receiving institution, is entitled under the Due Process Clause of the Fourteenth Amendment to more than a notice of the proposed transfer and an opportunity to be heard in opposition to the transfer.
2. Whether the Commonwealth of Massachuetts has sufficiently created an interest in remaining in any one prison to be cognizable as "liberty" or "property" under the Fourteenth Amendment.
3. Whether the Due Process Clause of the Fourteenth Amendment requires the disclosure of informant information when, in the judgment of prison officials, such disclosure would create a substantial likelihood of harm to the informants.
4. Whether the opinion of the Court of Appeals for the First Circuit is consistent with opinions of this Court.

## Statement of the Case

A. *Prior Proceedings.*

This action was originally commenced by seventeen inmates of MCI, Norfolk, a medium security institution within the Commonwealth of Massachusetts. Plaintiffs sought declaratory and injunctive relief and damages pursuant to 42 U.S.C. §1933. Six inmates later filed an



amended complaint and sought preliminary injunctive relief ordering their transfer from MCI, Norfolk to the maximum security institution at MCI, Walpole, rescinded. The preliminary injunction was heard by the District Court upon a stipulation of facts entered into by the parties and upon a submission of documents pertinent to the transfer. On January 10, 1975, the District Court issued an order, Appendix 23, granting certain injunctive relief against the prison officials. The order of the District Court was stayed in part by the District Court pending an appeal to the Court of Appeals for the First Circuit. Pending the appeal, the Court of Appeals stayed the remainder of the order because of the seriousness and complexity of the issues involved.

On June 27, 1975 the Court of Appeals, in a 2 to 1 decision, Judge Levin H. Campbell dissenting, affirmed the order of the District Court. The Court of Appeals stayed issuance of the mandate pending the filing and disposition of a petition for Certiorari with this Court.

B. *Facts*

There was no essential dispute as to the facts of this case. The critical incidents which comprise the complaint were set forth in a stipulation and are fairly stated in the opinion of the courts below.

From the late summer through the fall of 1974, there was a period of serious unrest at MCI, Norfolk, a "medium security" institution in the Commonwealth of Massachusetts. This period of unrest included nine fires within the institution serious enough to require the summonsing of fire departments from the neighboring communities. Prison officials believed that these fires were set by individuals within the institution. The petitioner Meachum, Superintendent of MCI, Norfolk, received confidential information

that certain inmates, among whom are the respondents in this action, were in some degree responsible for this unrest and for the fires occurring at the institution. Between October 16, and October 24, 1974, respondents in this action were taken from the general population MCI, Norfolk and placed in cells at the Receiving Building at Norfolk. The Receiving Building at Norfolk, was both a place apart from the general population and a place of stricter confinement than the general population.

On October 25, each of the inmates was given a disciplinary report purporting to describe the reasons of their removal from the general population. On November 4, 1974, the prisoners received notice of a classification hearing. The notice essentially repeated the matters earlier referenced in the disciplinary report and informed the inmates that a "classification hearing" would be held on a date to immediately follow. The notice of the classification hearing of the respondent Fano is included in the appendix as representative of the notices given to respondents. (App. 24) Certain of the respondents were given different notices but the substance of the notification procedure is represented by the document contained in the appendix. On November 6, 8, 11, and 13, 1974 classification hearings were held for each of the inmates on the information referenced on the notices. At the hearing, each inmate was present and allowed to make a personal statement to the board. Each inmate was represented by counsel. Each inmate was allowed to present evidence in his behalf and, indeed, the stipulation that was before the District Court and the Court of Appeals indicates that several of the prisoners, at least, produced corrections officers, who testified in their behalf. The Classification Board also heard evidence from each of the plaintiff's social workers during the course of the hearing.



The Classification Board opened the hearing by reading a prepared statement. Following the statement plaintiff and his attorney were asked to excuse themselves from the hearing room. Meachum then presented the board informant information which he had received along with a record of prior instances in which the informants' information had proven reliable. The superintendent's testimony was not taken under oath and the board specifically refused to tape-record the parts of the testimony dealing with the confidential information. The remainder of the hearings were tape recorded and made part of the institutional record. Following the return of the inmate and his counsel to the hearing room, the board informed him that the Superintendent had given informant information relating to the inmate's conduct at the institution. The board refused to further summarize the evidence because, in Meachum's, and the board's opinion, to do so would endanger the safety of the informants. Each plaintiff was, as noted earlier, allowed to present evidence to the board and to make any statement they wished to the board concerning their activities in the institution. Each plaintiff denied to the board any of the activity alleged in the disciplinary classification reports.

The board, however, basing its decision on Meachum's testimony, and the information supplied by Meachum, recommended transfers from Norfolk for all of the inmates. It was stipulated that the inmates were not given a written statement of the reasons for the board's action, but were rather orally informed by the board that its recommendations were based upon the informant information presented to it by the Superintendent. The parties also stipulated that the recommendations made by the board were essentially ratified by the Commissioner, though in some instances the recommendations were modified with respect to the receiving institution.

Following the Commissioner's approval, the inmates were transferred to the maximum security institution at Walpole. Walpole and Norfolk are approximately one mile apart. The inmates were subjected to no disciplinary punishment upon transfer to Walpole. They suffered no loss of good time and were not placed in administrative segregation upon their arrival. The inmates might be furloughed and paroled from the institution at Walpole, although it was conceded that the requirements were generally stricter at Walpole than at Norfolk.

## Reasons for Granting the Writ

### Introduction

The petitioners' ask this Court to grant a petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit on essentially three grounds: (1) the opinion of the court in the case below is inconsistent with opinions of this Court both in the Court of Appeals' failure to apply the "Entitlement Doctrine" to the facts of this case as well as its failure to specifically and accurately analyze the nature of protected interests asserted by the state prisoners; (2) the question of a state prisoner's interest in remaining in any one institution, and his interest in being free from notations on his institutional record, are serious and substantial constitutional questions encompassing both the liberty and property clauses of the Fourteenth Amendment; and (3) the lower federal courts are in disarray on these issues.

Since this Court's opinion in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) the lower federal courts have been dealing with the application of the concept of procedural due process to many and varied factual situations in prisons. The most ripened and specific questions which have arisen from the application of the principles of *Wolff* v. *McDon-*



*nell, supra,* have occurred in the area of intra-state transfers of state prisoners. This petition presents substantially similar questions as those presented by the case of *Preiser* v. *Newkirk,* U.S. , (June 25, 1975), *vacating and remanding, Newkirk* v. *Butler,* 499 F.2d 1214 (2nd Cir. 1974). The most substantial difference between the instant petition and *Preiser* v. *Newkirk, supra,* is that this case presents no issue of mootness. The instant petition is also similar to the case of *Haymes* v. *Montayne,* 505 F.2d 977 (2nd Cir. 1974), *cert. granted,* U.S. (June 30, 1975).

The instant petition also presents issues not presented by either of the aforementioned Second Circuit cases. This petition seeks to have this Court resolve whether or not the lower court was in error when it enjoined the transfer of individual inmates, who had been identified by the superintendent of the transferring institution as responsible for setting of fires and other disruptive activity at the institution. The petition seeks to have this Court determine whether or not the Court of Appeals was in error when it required the petitioners to give the prisoners a summary of the information that was before the hearing board when, in the judgment of the prison officials, such a summary would have served to identify informants and would have, consequently, placed the informants' lives in danger.

### I. The Opinion of the Court of Appeals Is in Conflict With Decisions of This Court.

The petitioners suggest that the Court of Appeals has misread one of the fundamental precepts used in determining whether or not the Fourteenth Amendment is to be considered applicable to a particular situation. Petitioners contend that it has long been the law that in determining ". . . whether due process requirements apply in the first

place, we must look not to the 'weight' but to the *nature* of the interest at stake". *Goss* v. *Lopez,* 419 U.S. 565 (1975) (preliminary print). However, the Court of Appeals, in its resolution of the question of whether due process was to apply, did not look, at least initially, to the nature but began by assessing the weight of the interests involved.

> "The question thus becomes one of whether the detriment worked by an intra-state transfer from a medium-security institution to a maximum-security prison is *serious enough* to trigger the application of due process protections."

(App. 32) (emphasis supplied).

It is apparent from this quote that the Court of Appeals was weighing the losses asserted by the prisoners rather than analyzing the nature of the interests claimed. This was incorrect.

"The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendments' protection of liberty and property." *Board of Regents* v. *Roth,* 408 U.S. 564, 569 (1972). In making the initial determination of whether the interest is, in fact, encompassed by the Fourteenth Amendment, it is not the weight of the interest that is crucial to the decision but rather the nature of the interest. *Board of Regents* v. *Roth* at 571. The distinction between "liberty" and "property" may often be an obscure one, particularly in the prison context, but, the Court of Appeals, in determining the instant case, made no threshold effort to determine whether or not the interests asserted by the state prisoners were in effect in the nature of liberty or property interests encompassed by the Fourteenth Amendment. Rather, the Court cumulated the deprivations asserted by the prisoners and held the weight of the deprivations asserted was sufficient



to trigger the procedural protections demanded by the Fourteenth Amendment.

Moreover, in failing to initially analyze the specific nature of the interests asserted by the prisoners the Court of Appeals is further in conflict with decisions of this Court. "Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss* v. *Lopez, supra* at 573, citing *Board of Regents* v. *Roth,* at 577. The Court of Appeals presumed that the rights that the individual prisoners were asserting in the case below were rights which the constitution itself protected. This assumption, the petitioners contend, is not correct; and it is in conflict with decisions of this Court.

> "*Morrissey* v. *Brewer,* 408 U.S. 471 (1972), applied the limitation of the Due Process Clause to governmental decisions to revoke parole, *although a parolee has no constitutional right to that status.* In like vein was *Wolff* v. *McDonnell,* 418 U.S. 539 (1974), where the procedural protections of the Due Process Clause were triggered by official cancellation of a prisoner's good time credits accumulated under state law, *although those benefits were not mandated by the constitution.*"

*Goss* v. *Lopez,* 419 U.S. at 573. (emphasis supplied)

As the vigorous dissenting opinion of Judge Campbell makes vividly clear, in deciding whether or not a prisoner's interest is either a liberty or property interest encompassed by the Fourteenth Amendment ". . . it should be recognized that Massachusetts has not conferred a statutory right upon inmates to be in one institution rather than another." The majority opinion of the Court of Appeals rejected the

distinction set out by Judge Campbell. The Court expressly declined to address the issues in terms of the possible creation of the interest by the State.

The interests asserted by the prisoners in this action do not constitute a "legitimate claim of entitlement" to any benefits protected by the Fourteenth Amendment. See *Board of Regents* v. *Roth, supra,* at 577; *Arnett* v. *Kennedy,* 416 U.S. 134, 165 (1974), (concurring opinion of Mr. Justice Powell). In the instant petition there are absolutely no statutes, regulations, or factual patterns which can be said to constitute any claim of entitlement to remain in or to go to, any specific institution in the Massachusetts prison system. The greatest inconsistency of the Court of Appeals with the decision of this Court is not in defining the nature of the interest but, rather, in failing to make any analysis whatsoever, as to whether or not a claim of entitlement exists to the continuation of the benefit or interest asserted by these prisoners. See Judge Campbell's perceptive analysis at App. 38 n. 2. Certiorari should be granted to correct these conflicts.

## II. The Lower Federal Courts Are in Conflict on the Issues Presented Here.

As noted above, since the decision of this Court in *Wolff* v. *McDonnell,* 418 U.S. 539 (1974) the lower federal courts have been faced with the difficulty of applying the concept of procedural due process to many and varied factual situations arising in the prison context. The decision of the lower federal courts in applying the concepts of procedural due process have produced conflicting results, particularly in the area of transfers of individual prisoners from one institution to another. This conflict is reflected specifically by the dissent of Judge Campbell from the majority opinion of the Court of Appeals. (App. 37). The granting of Certiorari by this Court in the cases



arising out of the Second Circuit, *Newkirk* v. *Butler,* 499 F.2d 1214 (2nd Cir. 1974), *vacated and remanded* U.S. (June 25, 1975) and *Haymes* v. *Montayne,* 505 F.2d 977 (2nd Cir. 1974) *cert. granted* U.S. (June 30, 1975) reflect an implicit recognition by this Court that the issues present here are of consequence.

Decisions involving the intra-state transfer of prisoners have produced widely conflicting results. *Compare, Schumate* v. *People of the State of New York,* 373 F. Supp. 1166 (S.D.N.Y. 1974) with *Beatham* v. *Manson,* 369 F. Supp. 783 (D. Conn. 1973). Some courts have held that transfers between state penal institutions are entirely a matter of administrative discretion. See *Benfield* v. *Bounds,* 363 F. Supp. 160 (E.D.N.C. 1973). In *Bundy* v. *Cannon,* 328 F. Supp. 165 (D. Md. 1971) the presence of different custody levels was not seen to require due process although the Court did hold that placement in segregation at the receiving institution would be sufficient to mandate procedural protection. See also, the concurring opinion of Judge Campbell in *Gomes* v. *Travisono,* 490 F.2d 1209 (1st Cir. 1973), *vacated and remanded,* 418 U.S. 909 (1974), *aff'd in part,* 510 F.2d 537 (1974), wherein Judge Campbell indicated his concurrence with the majority of the Court of Appeals only insofar as it was explicitly understood that the procedural protections referred to by the majority were not to be construed as applying to wholly intra-state situations.

In *Newkirk* v. *Butler, supra,* the Second Circuit required process when the custody level of the institution was being changed. The *Newkirk* Court appeared to have determined that there was an inherent deprivation in intrastate transfers sufficient to require procedural protections. *See also, White* v. *Gilman,* 360 F. Supp. 64 (S.D. Iowa 1973). *Stone* v. *Egeler,* 377 F. Supp. 115 (W.D. Mich. 1973).

There are cases, however, which hold that interstate transfers of state and federal prisoners do not necessarily require due process procedures. *Fajeraik* v. *McGinnis*, 493 F.2d 468 (9th Cir. 1974); *Hillen* v. *Director*, 455 F.2d 510 (9th Cir. 1972), *cert. denied* 409 U.S. 989 (1972). Many courts considering the question of intrastate transfers have required varying degrees of due process procedures. See *Kessler* v. *Cupp*, 372 F. Supp. 76 (D. Ore. 1973) as well as *Gomes* v. *Travisono, supra.*

The conflicting decisions of the lower federal courts on the question of whether or not procedural protections are constitutionally required when intrastate transfers of prisoners are involved is an issue that can be resolved only by this court. Involved are questions which implicate both the power of the federal court to affect the administration of state prison systems as well as a state inmate's general right to protection of "liberty" interests. The issues comprehend both federalism and considerations of judicial discretion.

As stated by Judge Campbell:

> "Where within the state penal system a prisoner is to be lodged seems to me a judgment which the state has the exclusive right to make—summarily if need be. Such decisions are part and parcel of its power to keep the prisoner safely, to protect other prisoners, and to operate its prisons." (App. 39)

In the instant case these issues are especially paramount. The plaintiffs in the case below were transferred from the institution at MCI, Norfolk, because, in the judgment of the Superintendent, as the result of information supplied to him by an informant, they had been responsible for setting fires and engaging in varying degrees of disruptive behavior at the institution. (App. 25-26). The decisions



below have required that these prisoners be transferred back to the institution, pending additional hearing procedures which the prison officials do not feel that they are able to afford, consistent with the safety of the institution and the inmates committed to their custody.

## III. The Issues Raised in This Petition Are Novel and Substantial Questions Which Justify a Decision by This Court.

The Court of Appeals, both in its analysis of whether procedural protections were to apply, as well as in its resolution of what the process was to consist of, raised substantial and novel issues concerning the applicability of the Fourteenth Amendment.

The resolution of other questions by the First Circuit, however, leaves yet an additional issue which has not been presented to this court by either the cases of *Haymes* v. *Montayne, supra,* or *Preiser* v. *Newkirk, supra.* This concerns the extent of an informant's right to remain anonymous when his information is being used as a basis for administrative decisions in the prison system. In the past substantial controversy existed over the right of an inmate to confront his or her accusers and cross-examine adverse witnesses at prison disciplinary hearings. See *Meyers* v. *Alldredge*, 492 F.2d 296, 308 (3rd Cir. 1974). This controversy was substantially clarified by the decision of this court in *Wolff* v. *McDonnell, supra.* The petitioners contended in the Court of Appeals that this Court's language in *Wolff* was dispositive of what, and how much, information was required to be given to the inmate. *See,* 418 U.S. at 565, where this court said ". . . that there will be occasions when personal or institutional safety are so implicated, that the statement [of reasons] may properly exclude certain items of evidence."

The Court of Appeals rejected petitioners' contention. In doing so, we suggest, the Court of Appeals went far beyond what this Court required in *Wolff*. We suggest the Court of Appeals promulgated a general rule which may well be read to permit a subjective analysis that would permit the lower federal courts to overrule the considered judgment of prison officials in any administrative matter which occurs within any state prison system, simply because the Fourteenth Amendment is invoked.

The District Court and the Court of Appeals have required that inmates, who have been specifically found by the superintendent of the transferring institution to be dangerous and disruptive, be sent back to that institution because procedural due process was not observed. This is a significant action because it gives no indication that the demands of federalism have been recognized and there is no apparent appreciation of the responsibilities of prison officials. The decision further creates a potentially dangerous situation because administrative officials may now feel that they cannot transfer a dangerous inmate if they cannot form evidentiary support for the judgment that they feel they are otherwise bound to make. The decision of the Court of Appeals places every prison official within its jurisdiction in a dilemma by conceding nothing to administrative good faith and substantially overlooking important interests of the state. As noted by Judge Campbell in his dissent below:

> "Administrative realities may sometimes necessitate the flexibility to transfer even on the basis of demonstrably inadequate information. If, for example, the warden has narrowed the likely cause of disruption down to several inmates, he may deem it prudent to transfer all without having objective proof that all are involved. A 40% risk that an inmate will disrupt



> or set a fire may, in some circumstances, be too great to take. The safety of other inmates and prison personnel may have to be weighed against fairness to certain individuals." (App. 40-41 n. 3)

## Conclusion

The issues presented by this petition are novel, complex, and are of overriding importance to the administration of the state prison systems. The complexity of the analysis which surrounds the interest of a state prisoner in his entitlement to certain rights within the prison system is of singular importance both from the viewpoint of the administrator as well as of the inmate. The necessity of deciding what is in fact the process due in potentially disruptive situations is an issue of monumental importance which can only be resolved by this Court. The question of what can be constitutionally required when informant information is being used as a basis of an administrative official's decision is fraught with danger and it has been unsatisfactorily resolved by Courts below. This Court, alone, can resolve these questions. For all of the reasons stated above the petitioners respectfully request that their application for a Writ of Certiorari be granted in this case.

Respectfully submitted,

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## APPENDIX

UNITED STATES DISTRICT COURT,
D. MASSACHUSETTS

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Civ. A. No. 74-5059-S.
ARTHUR FANO et al.,
Plaintiffs,
*v.*
LARRY MEACHUM et al.,
Defendants.

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### OPINION AND ORDER

Jan. 10, 1975.

SKINNER, District Judge.

This petition is brought under the Civil Rights Act, 42 U.S.C., Section 1983, for declaratory, injunctive, and compensatory relief by 17 inmates of the Massachusetts Correctional Institution, Norfolk, a medium security state prison operated by the Massachusetts Department of Correction. They allege, in substance, that they have been reclassified into substantially more adverse conditions of confinement because of specific prior conduct without the due process required by the Fourteenth Amendment to the Constitution of the United States.

The complaint was filed on November 4, 1974. The plaintiff's motion for a temporary restraining order was denied without hearing on the same day.

On December 12, 1974, six of the plaintiffs, namely Arthur Fano, Richard DeBrosky, Robert Dussault, David Hathaway, Richard McPherson and Charles Royce filed an Amendment Verified Complaint on behalf of themselves and "all others similarly situated." There has been no showing which would justify the certification of this action as a class action and the Amended Verified Complaint, therefore, will be considered only with reference to the six named plaintiffs who have filed it. The same six plaintiffs (hereinafter referred to as the plaintiffs) have filed a motion for a preliminary injunction on which a hearing was held on December 20, 1974. The matter was presented on stipulations of fact, stipulated documents, and the testimony of the plaintiff Hathaway. There does not appear to be any material issue of fact.



### FINDINGS OF FACT

In the fall of 1974, there was a period of unrest among the inmates of M.C.I., Norfolk. From August 13, 1974 through October 23, 1974, there were nine fires in the institution, thought to have been set, which were serious enough to require the presence of outside fire departments. In addition, there were three less serious fires, one on October 25, 1974, one on October 31, 1974, and one on November 26, 1974.

Plaintiff McPherson was taken from the general population at M.C.I., Norfolk, on or about October 16, 1974, and placed in a cell in the Receiving Building at the institution (hereinafter referred to as the RB). On October 24, the plaintiffs Fano, DeBrosky, Dussault, Hathaway and Royce were taken from the general population and placed in cells in the RB.

The RB at M.C.I., Norfolk, is apparently principally used for the processing of new inmates. In effect, it also serves as an informal Departmental Segregation Unit, though it apparently has not been officially designated as such. The conditions of confinement in the RB are roughly

comparable to those in the Departmental Segregation Unit, Cell Block 10, at M.C.I., Walpole, described in the Revised Opinion and Order in Daigle et al. v. Hall et al., CA 74-4783-S, filed January 7, 1975. No notice or hearing was afforded the plaintiffs before their transfer to the RB.

On October 25, 1974, the defendant Meachum filed and presented each plaintiff with a copy of a disciplinary report. The offenses charged against each plaintiff were described in substantially the same terms as appears in the notices of reclassification hearings hereinafter quoted. In each case the offense charged was referred to the local District Attorney for investigation and outside prosecution. Consequently, in accordance with paragraph VII D of Commissioner's Bulletin 72-1, no disciplinary hearing was held.

On November 4, 1974, each of the six plaintiffs received a Notice of Classification Hearing. With reference to the plaintiffs Fano, DeBrosky, and Dussault, the reason for review of the classification status was set forth as follows:

> "The department has received information through a reliable source that you were in possession of instruments, or materials, that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.
>
> "These items and plans occurred during a period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage."

With respect to the plaintiffs Hathaway and McPherson, the reason for review of the classification status was stated as follows:

> "The department has received information through reliable sources that you were significantly involved in the planning and execution of one or more of the



> serious fires occurring with MCI Norfolk in the past few weeks. These fires caused considerable property damage and posed a very real threat to personal safety."

With respect to plaintiff Royce, the reason for review of the classification status was as follows:

> "The department has received information through a reliable source that you were involved in the trafficking of contraband in MCI, Norfolk, (narcotics, barbiturates and/or amphetamines.) This occurred during a period of serious unrest at MCI Norfolk which included many fires, that posed a significant threat to the lives of persons at MCI Norfolk as well as serious property damage."

On November 6, 8, 11 and 13, classification hearings were held with respect to each of the six plaintiffs. Each plaintiff was represented by counsel. The evidence with respect to the alleged offenses committed by the plaintiffs, however, was given in closed session outside of the presence of the plaintiffs and their counsel and was apparently, in each case, in the form of recitation by the defendant Meachum of information purportedly furnished to him by a confidential informant. The nature of this information has never been made known to the plaintiffs or to their counsel even in summary form. They have not been informed of even so much as the dates and places of the alleged offenses.

The classification board made a recommendation for a transfer to either Walpole or Bridgewater in the case of each plaintiff except Royce, who was to be held in administrative segregation for thirty days and given a second classification hearing at the end of thirty days. Each plaintiff appealed this classification recommendation to the defendant Hall. The defendant Hall denied the appeals, but modified the recommendations of the classification com-

mittee and entered orders transferring all of the plaintiffs, including Royce, to MCI, Walpole, except Hathaway, who was ordered to be transferred to MCI, Bridgewater. At the time of the hearing all of these transfers had been accomplished except that of the plaintiff LeBrosky, who was in the hospital at MCI, Norfolk, and Hathaway, who was retained in the RB at MCI, Norfolk.

[1] I find that the conditions of confinement at MCI, Walpole and MCI, Bridgewater, are substantially more adverse than they are at MCI, Norfolk. I further take judicial notice that these institutions have been deliberately differentiated to provide graduated conditions of confinement within the Department of Correction.

RULINGS

This state of facts raises once again the issue of the subjection of prison inmates to what are essentially disciplinary procedures without the elements of due process required under the rule of Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2968, 41 L.Ed.2d 935 (1974). As in Daigle v. Hall, *supra,* a hearing before a disciplinary board was bypassed because the alleged offenses had been referred to the local District Attorney for investigation and prosecution. The applicable rules of law were extensively discussed by this court in the Revised Opinion and Order in Daigle v. Hall filed January 7, 1975, and need not be repeated here.

The defendants assert, however, that the cases of these plaintiffs do not fall within the general rule and that they have received all of the due process to which they are entitled, because the information concerning their alleged offenses was derived from confidential informants. The defendants claim that they are not obliged even to provide a summary of the information derived from the confidential informant, or even so much as the dates and places of the alleged offenses, because to do so would compromise



the confidential informants. They further assert that the policy which they have followed in these cases is necessary to safeguard the lives of the confidential informants, to preserve the flow of information to the administration and to maintain the safety and good order of the institution.

The defendants apparently feel that they are unable, at the medium security institution at Norfolk, to follow the minimum requirements established for such situations at the maximum security prison at MCI, Walpole.

[2] Institution Order 4310.1,* which is applicable to disciplinary hearings at Walpole, contains in Section 11.4 h) the following provisions:

> "The board may issue any orders it deems necessary to conducting a thorough and adequate investigation, including the calling of witnesses and production of evidence. No testimony may be taken outside the accused resident's presence unless he voluntarily absents himself, or the board chairman determines that disclosure would involve.
>
> (1) Subjecting the informant to a risk of harm or
>
> (2) A substantial risk to institutional security
>
> (3) On making a finding that a threat exists and that there is need for protection of sources, the board chairman will note such a finding in the hearing record
>
> (4) He will also summarize the information in question for the accused resident and state generally the board's reasons for such protective action."

[3] It is absolutely basic to any concept of due process that a person charged be given sufficient information con-

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*This Order was not introduced in evidence in this case, but in Daigle v. Hall, *supra.* The defendant Hall, at least, is charged with knowledge of it, and the Court takes judicial notice of it for purposes of this case.

cerning the charge against him so that he may intelligently prepare a defense. The above quoted Section 11.4 h) sets forth the constitutional minimum. The defendants thus have three constitutionally acceptable choices:

1. To follow a procedure substantially in accordance with the above quoted Section 11.4 h);
2. To develop independent evidence which would obviate the need for the confidential informant's testimony; or
3. To forego disciplinary action if the interest in preserving the secrecy of confidential information is deemed paramount.

[4] It is clear that the procedure followed by the defendants with respect to these plaintiffs does not meet constitutional requirements of due process, and their actions with respect to these plaintiffs cannot be allowed to stand. The notice of the hearing, furthermore, must at the very least state the time and place of the alleged offense with reasonable accuracy.

[5] Since uniformity is an aspect of due process in a correctional institution, the matters herein referred to should be the subject of departmental regulation. Most of these matters are covered by the order in Daigle v. Hall, *supra*. There is no evidence of any order in force at MCI Norfolk comparable to Institution Order 4310.1. Some regulation conforming in substance to Section 11.4 h) of that order must be promulgated. Whether it should be promulgated as a departmental order or left to the superintendents of the various institutions to produce approximate versions of it, is up to the defendants. Although Institution Order 4310.1 provides disciplinary hearing rules which exceed the minimum requirements of Wolff v. McDonnell, *supra*, there should be reasonable uniformity within the department; inmates at Norfolk are entitled to at least the level of due process afforded their brethren at Walpole.



[6] In accordance with the foregoing, I hereby enter the following Preliminary Order.

PRELIMINARY ORDER

It is ordered, adjudged and decreed as follows:

1. The defendants are ordered to return the plaintiffs to the general population at MCI Norfolk forthwith, and not transfer them to conditions of confinements substantially more adverse than the conditions of confinement at MCI Norfolk by reason of their specific prior conduct, until they have been afforded a hearing substantially in accordance with the requirements of a disciplinary hearing as set forth in Commissioner's Bulletin 72-1 and Institution Order 4310.1; notwithstanding the fact that much specific prior conduct may have been referred to an outside law enforcement agency for investigation or prosecution.
2. The defendants Hall and Meachum, or either of them, are ordered to submit to the court for approval regulations governing the inmates at MCI Norfolk which will provide them with rights to hearings substantially in accordance with Institution Order 4310.1 and the orders of the court entered in Daigle v. Hall, *supra*.
3. Nothing herein contained shall prevent the defendant Meachum from placing the plaintiffs, or any other inmate, in the Receiving Building for a short period on an emergency basis if, in his considered opinion, the safety of inmates or the good order of the institution require it; provided that in every case an appropriate hearing be afforded the inmate as promptly as possible.
4. This case shall stand for further hearings on the claims of the other eleven plaintiffs and for hearings on the claims of all plaintiffs for damages.

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## EXHIBIT 7

[Letterhead — THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION]

To: Arthur Fano
Date: November 4, 1974

### NOTICE OF CLASSIFICATION HEARING

You are hereby notified that a classification hearing will be held at MCI Norfolk by a Department Review Board on Wed., 11-6-74.

Following the hearing, the Department Review Board will make a recommendation to the Commissioner concerning your institutional status or your possible transfer. You may be represented by council at this hearing if you choose. A reasonable continuance may be granted by the Board if needed, for this purpose.

The department has received information through a reliable source that you were in possession of instruments, or materials, that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.

These items and plans occurred during a period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage.

In view of this information, a review of your record and classification status is required.

Based on the seriousness of the danger represented, the Superintendent has decided that your confinement in an awaiting action area, pending a hearing, was necessary.

(s) LARRY SOLOMON
LARRY SOLOMON
Deputy Commissioner
Classification and Treatment

cc: Chairman, Departmental Review Board
Superintendent, MCI Norfolk
Frank A. Hall, Commissioner



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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Misc. Civil Action No. 74-5095-S
FANO, ET AL.,
Plaintiffs,
*v.*
MEACHUM, ET AL.,
Defendants.

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### AFFIDAVIT OF LARRY MEACHUM

I, Larry Meachum, being duly sworn, hereby depose and say:

1. I am the Sunperintendent of the Massachusetts Correctional Institution, Norfolk.

2. During the month of October, 1974 there was a period of serious disruption at M.C.I., Norfolk during which numerous fires were set in the institution. Some of these fires caused severe damage to the institution. Bed space of 100 inmates was rendered unusable by the fires.

3. Based upon information from reliable inmate informant sources which was relayed to me by members of my staff, I concluded that Plaintiffs were among the inmates responsible for the disruption in the institution. Specifically, informant information linked Plaintiffs Hathaway and McPherson to the setting of fires in the institution, Plaintiff Royce to trafficking in contraband (narcotics, barbiturates, and amphetamines), and Plaintiffs Dussault, Fano, and DeBrosky to the possession of weapons.

4. Based upon this information, Plaintiffs and other inmates were removed from the population at M.C.I., Norfolk to an area of separate confinement at the institution. Plaintiffs were then given notices of classification

hearings, copies of which were filed with the Court with a Stipulation of the parties on December 20, 1974.

5. Plaintiffs were then afforded classification hearings at which they could be represented by counsel. I am informed that at the beginning of each hearing, the Plaintiff who was the subject of the hearing was informed that there was informant information to be presented to the board and that this would be done without the inmate or his counsel being present and that the inmate and his counsel were then asked to leave the room. I then presented to the board the informant information which I had received along with a record of prior instances of each informant's information having proved reliable.

6. In my opinion, giving Plaintiffs a more detailed description of the activities they were alleged to have been involved in would have created a substantial risk of revealing the identity of the informants, thereby placing their lives in danger.

7. Following these hearings and final decision by the Commissioner of Correction, the Plaintiffs were removed from M.C.I., Norfolk to M.C.I., Walpole with the exception of Plaintiff Hathaway who was removed to M.C.I., Bridgewater.

8. Except for a few minor instances, the fires at M.C.I., Norfolk stopped after the Plaintiffs and other inmates were removed from the institution.

9. Since the Plaintiffs and other inmates were removed from M.C.I., Norfolk, I and members of my staff have received information from inmates other than the original informants of the effect that the administration had removed from the population of M.C.I., Norfolk the inmates who were responsible for the disruption in October of 1974.

10. In my opinion, if Plaintiffs are permitted to return



to the population at M.C.I., Norfolk, there will be a very great risk of further disruption at the Institution.

(s) LARRY MEACHUM
LARRY MEACHUM

Subscribed and sworn to before me in the City of Boston, County of Suffolk, Commonwealth of Massachusetts, this 22nd day of January, 1975.

(s) ILLEGIBLE
*Notary Public*

My Commission expires: Nov. 7, 1980.

# United States Court of Appeals
## For the First Circuit

No. 75-1033

ARTHUR FANO, et al.,
PLAINTIFFS, APPELLEES,
*v.*
LARRY MEACHUM, et al.,
DEFENDANTS, APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[387 F. Supp. 664]
(WALTER JAY SKINNER, *District Judge*)

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

*Michael C. Donahue*, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, and *John J. Irwin*, Assistant Attorney General, Chief, Criminal Division, were on brief, for appellants.

*Richard Shapiro*, with whom *Robert A. Stolzberg* was on brief, for appellees.

June 27, 1975

COFFIN, *Chief Judge*. We turn once again to the task of evaluating inmates' due process claims in the wake of *Wolff* v. *McDonnell*, 418 U.S. 53 (1974). The district court provides us with a succinct summary of the facts, which the parties accept as accurate. 387 F. Supp. 664, 666-67 (D. Mass. 1975). In the fall of 1974 there was a period of unrest at the Massachusetts Correctional Institution at Norfolk. There were nine fires, thought to have been set, which were serious enough to require the presence of outside fire de-



partments, and several other fires which were less serious. Plaintiffs were taken from the general population at Norfolk and placed in the Receiving Building at the Institution, which serves as an informal segregation unit. On October 25, 1974, each plaintiff was given a copy of a disciplinary report. The offenses charged against each plaintiff were described in substantially the same terms as appeared in the notices of reclassification hearings subsequently received. Since the alleged offenses were referred to the local district attorney for investigation and possible prosecution, the applicable regulation directed that no disciplinary hearings be held.[1]

On November 4 each plainaiff received a Notice of Classification Hearing. These notices reported that information received through reliable sources indicated that the plaintiffs were variously linked to the planning and execution of the fires, possession of contraband such as weapons, or trafficking in drugs. Classification hearings[2] were held, at which each plaintiff was represented by counsel. The evidence with respect to the alleged offenses, however, was given in closed session outside of the presence of plaintiffs

[1] The regulation is based on the theory that to grant a hearing might create difficulties of either double jeopardy or denial of the privilege against self-incrimination. We do not share the view that prosecution may not constitutionaliy be based on conduct which is also the subject of disciplinary proceedings. *See, e.g., Palmigiano* v. *Baxter*, 510 F.2d 537 (1st Cir. 1974). Nor do we feel that this concern on the part of the Commonwealth, if well-founded, could immunize what would otherwise be a due process violation. *See Daigle* v. *Hall*, 387 F. Supp. 652, 660-62 (D. Mass. 1975); note 2 *infra*.

[2] We attach no significance for present purposes to the fact that these proceedings were for "classification" rather than "discipline". Defendants assert that "there are in the instant case as many administrative overtones as disciplinary ones", but we have already indicated that in our view the motive of prison officials, as such, is not properly a part of the due process calculus. *Gomes* v. *Travisono*, 510 F.2d 537, 541 (1st Cir. 1974). Whether the transfer is thought of as punishment or as a way of preserving institutional order, the effects on the inmate are the same and the appropriateness of the action depends upon the accuracy of the official allegation of misconduct.

and their counsel and was apparently, in each case, in the form of a recitation by Superintendent Meachum of information purportedly furnished to him by a confidential informant. The nature of this information was not revealed to plaintiffs or their counsel, even in summary form, nor were they informed of the dates and places of the alleged offenses.

The classification board recommended transfer to either Walpole or Bridgewater for all of the plaintiffs except Royce. These recommendations were appealed to Commissioner Hall. The appeals were denied, though the recommendations were modified in some instances with regard to the receiving institution and Royce was ordered transferred to Walpole.

Plaintiffs sought declaratory and injunctive relief and damages. 42 U.S.C. § 1983. The district court found that the proposed transfers violated the inmates' due process rights under the Fourteenth Amendment, and defendants were enjoined from carrying out the transfers until fuller hearings were held.[3] We have occasion here to review only the propriety of this preliminary injunction, the district

[3] This action was originally commenced by seventeen inmates alleging that their reclassification into substantially more adverse conditions of confinement within Norfolk denied them due process. The six inmates now before the court as appellees subsequently filed an amended complaint raising the additional issue relating to the impending transfers from Norfolk to other institutions. The district court's hearing on the request for a preliminary injunction was limited to the claims of those six plaintiffs. Although the order entered by the district court directed defendants to return the plaintiffs to the general population at Norfolk, the parties to this appeal have addressed themselves only to the issues raised by transfers from Norfolk to other prisons. We therefore will not consider here the application of due process principles to reclassification within a single institution. We note that the reclassification issue has been directly confronted in *Daigle* v. *Hall*, 387 F. Supp. 652 (D. Mass. 1975).



court having reserved decision on the damage claims pending further hearings.[4]

The first issue presented is whether the decision to transfer inmates from Norfolk to maximum security institutions within Massachusetts is of such a character that the due process rights of potential transferees are brought into play. *Palmigiano* v. *Baxter*, 487 F.2d 1280, 1284, (1st Cir. 1973), *vacated*, 418 U.S. 908 (1974), *after remand*, 510 F.2d 534 (1974), *cert. granted*, U.S. (June 9, 1975); *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). We first grappled with the due process issues presented by prison transfers in *Gomes* v. *Travisono*, 490 F.2d 1209 (1st Cir. 1973) That case involved Rhode Island inmates who were being transferred to prisons throughout the country, and, in concluding that such transfers had an impact on inmates' liberty sufficient to require due process protections, we took pains to emphasize that we did not view that disposition as foreclosing a contrary result with regard to intrastate transfers. *Id.* at 1214 n. 8; *id.* at 1217 (Campbell, J., concurring). The Supreme Court subsequently offered its initial guidance in this area. *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). *Wolff* established that the forfeiture or withholding of "good time" credits affects a prisoner interest which "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id.* at 557. *Gomes* was vacated for reconsideration in light of *Wolff*, 418 U.S. 539, and after remand we proceeded to reconsider "What procedures are required?", after noting

[4] Defendants' appeal from the district court's failure to dismiss the damage action must be dismissed for want of a final decision. 28 U.S.C. § 1291; *King* v. *Higgins*, 495 F.2d 815, 815 n.1 (1st Cir. 1974).

that *Wolff* reaffirmed "that prisoners suffering the prospect of serious deprivations are entitled to some process". 510 F.2d 537, 539 (1974).

The question thus becomes one of whether the detriment worked by an intrastate transfer from a medium-security institution to a maximum-security prison is serious enough to trigger the application of due process protections. Defendants correctly point out that *Gomes* may be distinguished from the instant case to the extent that our resolution of the interstate transfer question relied upon the assumption that interstate transfers will often be conducted between institutions which are separated by a significant distance. We noted in *Gomes* that the distance factor alone may make communication and visitation more difficult, and it is true that here the geographical issue is an irrelevant one.[5] Moreover, there has been no suggestion that the plaintiffs are subject to the administrative segregation to which interstate transferees were routinely subjected upon arrival at the receiving institutions.

In other ways, however, the disadvantages attendant upon these transfers are both more serious and more certain than those flowing from interstate transfers. While *Gomes* recognized that transferees were subjected to temporary administrative segregation at the receiving prisons, it was not assumed that thereafter their conditions of confinement would be more adverse than they had been before transfer. Defendants have stipulated, however, that Walpole and Bridgewater have stricter security and fewer rehabilitative

[5] Defendants inform us that Norfolk and Walpole are approximately one mile apart. Plaintiffs do not claim that transfer from Norfolk to either Walpole or Bridgewater creates difficulties because of the distance involved. This does not mean, of course, that transfers within a single state will never cover a distance sufficient to make them burdensome. *See United States ex rel. Haymes* v. *Montanye*, 505 F.2d 977 (2d Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3282 (Nov. 1, 1974) (No. 74-520).



programs than Norfolk, and that furloughs are more difficult to obtain at Walpole. The district court's findings of fact included the following:

> "I find that the conditions of confinement at MCI, Walpole and MCI, Bridgewater, are substantially more adverse than they are at MCI, Norfolk. I further take judicial notice that these institutions have been deliberately differentiated to provide graduated conditions of confinement within the Department of Correction." 387 F. Supp. at 667.

*See also Daigle* v. *Hall*, 387 F. Supp. 652, 659 (D. Mass. 1975). Defendants do not challenge the accuracy of this finding, nor could they easily do so in light of the facts to which they had stipulated, though they do argue that the hardships incurred through transfer do not assume constitutional proportions.

It should not escape notice that, aside from the distinctions discussed above, the consequences of intrastate and interstate transfers are for the most part indistinguishable. In either case "disadvantages stem from the breaking off of established programs, both educational and rehabilitative, and orientation to a new setting, programs, rules and companions." *Gomes I*, 409 F.2d at 1213. What was viewed in *Gomes* as a possibility—that a transferee may be considered an identified troublemaker and treated unfavorably as a result—has been stipulated to in this case. The parties agreed that the "determination to transfer Plaintiffs, and the basis therefore, will be noted on their institutional record and will be considered by the Parole Board, the Furlough Board and other administrative agencies of the Department of Correction. This may affect Plaintiffs' attempts to gain parole, furlough, work release, and other privileges." *See generally Catalano* v. *United States*, 383 F. Supp. 346 (D. Conn. 1974).

In light of the disadvantages accompanying the transfers here at issue, the legal principles articulated in *Wolff*, *Gomes* and the transfer cases decided by other lower federal courts compel the conclusion that the due process clause is applicable. At issue is not a simple loss of privileges, for which a hearing may not be required, *Wolff*, 418 U.S. at 571-72 n. 19, but a significant modification of the overall conditions of confinement. We hold that the inmate interests affected fall within the "liberty" protected by the Fourteenth Amendment.[6] *Wolff*, 418 U.S. at 557; *Newkirk* v. *Butler*, 499 F.2d 1214 (2d Cir.), *cert. granted*, 95 S. Ct. 172 (1974); *Clonce* v. *Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974); *Robbins* v. *Kleindienst*, 383 F. Supp. 239 (D. D.C. 1974); *see Palmigiano* v. *Baxter*, 487 F.2d 1280, 1284-85 (1st Cir. 1973), *vacated*, 418 U.S. 908 (1974), *after remand*, 510 F.2d 534 (1974), *cert. granted*, U.S. (June 9, 1975); *Clutchette* v. *Procunier*, 497 F.2d 809, 814-15 (9th Cir. 1974), *on rehearing*, 510 F.2d 613 (1975), *cert. granted*, U.S. (June 9, 1975).

*Wolff* requires that, having found due process guarantees to be applicable, we proceed to determine what procedures are appropriate under the circumstances. This is done by balancing the substantiality of the loss an inmate would suffer because of transfer against the burden which the procedures would place on prison officials. *Gomes II*, 510 F.2d at 541. While this inquiry will in many cases be multi faceted, here the controversy is an extremely narrow one. In the first place, plaintiffs' only objection to the hearings which they were given is that they were excluded during the recitation of information said to have been provided by

[6] It makes no difference that the Commonwealth need not have created a corrections system containing institutions with divergent conditions of confinement. The advantages of confinement in a more desirable institution are in this regard similar to the state-created right to good time credits which was involved in *Wolff*, 418 U.S. at 556-58.



confidential informants. Plaintiffs were not given any summary of the evidence beyond that contained in the notices which preceded the hearings.

*Wolff* found that under the circumstances there presented due process required that there be a written statement as to the evidence relied on and the reasons for the disciplinary action. It was recognized, however, "that there will be occasions when personal or institutional safety are so implicated, that the statement may properly exclude certain items of evidence." 418 U.S. at 565. This cryptic reference offers us little assistance in our effort to determine whether the prison officials were within their authority here in declining to reveal the substance of the informant statements. The defendants' freedom of action can be no greater in this context than that which *Wolff* accords with regard to confrontation and cross-examination, matters left "to the sound discretion of the officials of state prisons" because they were viewed as presenting greater hazards to institutional interests than the requirement of a written statement.

That the issue is narrowed even further is evident from the basis of the district court's decision. In ruling that the defendants must provide a summary of the information derived from informants, the district court relied primarily on section 11.4(h) of Institution Order 4310.1 (Jan. 29, 1974), which prescribes the procedures to be followed in disciplinary hearings at Walpole:

> "The board may issue any orders it deems necessary to conducting a thorough and adequate investigation, including the calling of witnesses and production of evidence. No testimony may be taken outside the accused resident's presence unless he voluntarily absents himself, or the board chairman determines that disclosure would involve:

(1) Subjecting the informant to a significant risk of harm, or
(2) A substantial risk to institutional security
(3) On making a finding that a threat exists and that there is need for protection of sources, the board chairman will note such a finding in the hearing record
(4) He will also summarize the information in question for the accused resident and state generally the board's reasons for such protective action."

Defendants misapprehend the basis for the district court's decision when they assert that they "were under absolutely no obligation to follow at Norfolk" this Walpole regulation. Even aside from the equal protection problems which might arise were inmates in different institutions given substantially different procedural protections, the district court properly viewed the Walpole regulation as a persuasive indication that the release of a summary of informant-provided information is not inconsistent with institutional requirements. Indeed, no suggestion has been made that the Walpole rule is unworkable or unduly burdensome. Having chosen to extend the protections of section 11.4(h) to inmates at the maximum-security institution at Walpole, defendants may not, even in the exercise of the discretion recognized in *Wolff*, deny similar procedures to inmates at Norfolk, a medium-security prison. The balancing of interests required for the application of due process principles in the prison environment is not one for which courts are particularly well-equipped, and here the district court quite properly resolved the controversy before it by reference to the balancing reflected in the Walpole regulations.

One subsidiary point remains. Under the procedures mandated by the district court, the notice of hearing given



inmates must "at the very least state the time and place of the alleged offense with reasonable accuracy". Not only is it difficult to discern how a notice lacking this element could adequately inform an inmate of the charges against him and enable him to prepare an adequate defense, *Wolff*, 418 U.S. at 564, but this information would not in any case go beyond that which we have held must be provided in summary form after presentation at the hearing. Since we can see no significant institutional interest which would be served by withholding at the time of notice information which must ultimately be revealed, we agree with the district court as to the required form of notice.

*Affirmed.*

CAMPBELL, *Circuit Judge* (dissenting). As the issue of intra-jurisdictional prison transfers is under submission before the Supreme Court in *Newkirk* v. *Butler*, 499 F.2d 1214 (2d Cir. 1974), *cert. granted sub. nom. Preiser* v. *Newkirk*, No. 74-107 (argued Jan. 20, 1975), it seems likely that what we do or say here will have only passing significance. Still I shall venture the view that a prisoner's interest in remaining in one institution rather than another within the same state is not a species of "property" or "liberty" as those words are used in the due process clause of the Constitution.

In *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974), the Court held that good-time credits, having been created by the state and denied as a penalty for major misconduct, were embraced within fourteenth amendment "liberty". *See Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). *See also Haines* v. *Kerner*, 404 U.S. 519 (1972) (disciplinary confinement

affects a protected interest). But transfers [1] seem to me to belong in a quite different category. Transfers unquestionably have a major impact on the personal life of a prisoner (although intrastate transfers do not uproot the inmate and separate him from a unitary system of correction and parole as in the case of interstate transfers). But in deciding whether or not to label the prisoner's interest therein a "liberty" or (less plausibly) a "property" interest within the fourteenth amendment, it should be recognized that Massachusetts has not conferred a statutory right upon inmates to be at one institution rather than another. While Walpole is a more secure facility than Norfolk, a prisoner has no vested right to serve his term in one place rather than the other. One might draw an analogy, admittedly only suggestive, to the status of school teachers: good-time rights, like a tenured teacher's expectation of continued employment, are matters of entitlement absent cause for severance; but a prisoner's preference that he be lodged at Norfolk rather than Walpole is not a matter of entitlement and seems more analogous to a probationary teacher's unsecured hope to retain a job. *Cf. Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

The tenured teacher's interest is, of course, a "property" rather than a "liberty" interest. Still, even in defining a prisoner's "liberty" interest, one must ask not only whether a particular event may cause loss to the prisoner but whether one in the position has any claim to what was taken away.[2] Prisoners are, by definition, prisoners.

[1] This circuit held in *Gomes* v. *Travisono*, 490 F.2d 1209 (1973), *vacated and remanded*, 418 U.S. 908 (1974), *aff'd in part*, 510 F.2d 537 (1974), that transfers of state prisoners to out-of-state correctional institutions pursuant to interstate compact triggered due process standards. I expressly reserved judgment on transfers within a single jurisdiction.

[2] A civil servant sent to Alaska, a soldier sent to Vietnam, or a prisoner sent to another institution may, in a private sense, suffer "grievous loss", but the nature of the organization and of their role precludes acknowledging any "liberty" or "property" right to remain in one location. Notwithstanding language in *Morrissey* v. *Brewer*, 408 U.S. 471, 481-84 (1972), cautioning against distinctions based on "privileges" as opposed to "rights", it is necessary to consider not only whether what happens causes subjective loss to the individual, but whether he has a right to any protection against that loss.



Changes in the conditions of confinement, whether involving a different cell assignment, a new meal schedule, or transfer to a new facility, seem to me to fall within the state's general right to confine, safeguard, and rehabilitate. To treat them as "liberties" belonging to the inmate invites greater interference with the management of prisons than seems either wise or constitutionally mandated.

Where within the state penal system a prisoner is to be lodged seems to me a judgment which the state has the exclusive right to make — summarily if need be. Such decisions are part and parcel of its power to keep the prisoner safely, to protect other prisoners, and to operate its prisons. State penal systems normally consist of more than one institution. Indeed, large states may have dozens of such institutions. Administrators must decide where best to place inmates. They must consider available space and facilities and which programs are best suited to which inmates. As prisoners are involuntary inhabitants and some are dangerous and unpredictable, administrators must decide whether a given inmate is more likely to escape from one place than another, and whether the mere presence of an inmate in a given setting is likely to be volatile and more dangerous. Such judgments may often be little more than educated guesses based on suspicions. They may involve predictions of future dangerousness which in turn echo assumptions as to the inmate's role in past disturbances. While I can understand the argument that no adverse assumptions should ever be made without minimal due process—hearing, confrontation of witnesses, and the like

—I do not think the realities of the state-prisoner relationship admit to classifying such decisions, when relating to a transfer, as a liberty interest of the prisoner. Penal authorities will perhaps think it best to afford safeguards but I do not think the Constitution can reasonably be said to require them.

I concede that transfers of the present sort—based on charges of past misconduct rather than on more general grounds—bear many resemblances to disciplinary actions. Here the inmate's record will reflect the grounds for transfer and this will affect his parole rights. In *Gomes I*, dealing with interstate transfers, we thought that a distinction could be made between punitive and non-punitive transfers. But on reflection we recognized, correctly I believe, that giving effect to labels of that sort raised more problems than it solved. It would invite litigation and confusion over the "real" as opposed to the ostensible reason for transfer. Moreover, transfers based on past misconduct are not so much punitive as they are intended to ward off future disruption at the transferor institution. The decision is thus also truly "administrative". In *Gomes II* we eliminated any attempted distinction, and decided that all out-of-state transfers should be treated alike for due process purposes. I think this is the right approach, and I would not wish to decide the present case on the basis of fine-spun distinctions between labels. Rather I feel obliged to conclude that an inmate is no more entitled to due process protection in connection with transfers for purported misconduct than he would be for any other reason. The reason for transfer is simply irrelevant. The state's interest is paramount.[3]

[3] Administrative realities may sometimes necessitate the flexibility to transfer even on the basis of demonstrably inadequate information. If, for example, the warden has narrowed the likely cause of disruption down to several inmates, he may deem it prudent to transfer all without having objective proof that all are involved. A 40% risk that an inmate will disrupt or set a fire may, in some circumstances, be too great to take. The safety of other inmates and prison personnel may have to be weighed against fairness to certain individuals.



Nonetheless, while the greater good of the institution and its other inmates may require that administrators retain broad transfer power, there can be no reason to permit an inmate's parole chances to be diminished by derogatory information he is never allowed to meet. This is a separate and different question. If Parole is a "liberty" right entitling an inmate to fair procedures, I would forbid the use of the fact of transfer by the parole board unless the charges upon which the transfer was based were established in a manner comporting with due process.

I would reverse the decision of the district court, except I might enjoin the adverse use of the fact of transfer in any future parole proceedings.